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No. ...-...
IN THE

Supreme Court of the United States

October Term, 1982

VOLVO OF AMERICA CORPORATION, a Delaware corporation;
and AKTIEBOLAGET VOLVO, a Swedish corporation,
Petitioners,

vs.

CHARLENE P. ROSACK, on behalf of others similarly situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA.

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Respondent.

Question Presented.

Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibit a state court from certifying a class action where the only named plaintiff is not a member of the class she purports to represent?

Parties to the Proceedings Below.

Petitioners Volvo of America Corporation and Aktiebolaget Volvo were defendants and respondents in the proceedings before the Court of Appeal of the State of California below. Volvo Western Distributing, Inc. was also named as a defendant and respondent in those proceedings, but this former subsidiary of Volvo of America no longer exists.

Respondent Charlene P. Rosack was the plaintiff and appellant before the Court of Appeal below, on behalf of others similarly situated.

Petitioners' statement pursuant to Supreme Court Rule 28.1 is set forth in the Appendix hereto at page E43.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings Below	i
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	11

I.

Class Certification Where the Only Named Plaintiff Is Not a Member of the Class Denies Defendants Their Due Process Right to Confront and Fully Adjudicate Class Claims	11
--	----

II.

Certification of Respondent as a Class Representative Denies Volvo's Due Process Right to Fully Ad- judicate Its Claims Against a Bona Fide Class ...	14
---	----

III.

Due Process Limits Must Be Imposed on This State Class Action to Prevent Injustice and to Discourage Attorney-Generated Class Actions	17
---	----

IV.

Certification of a Non-Member Class Representative Denies Volvo's Right to a Final Judgment Binding on All Class Members	19
--	----

V.

The Decision Below Is Also Not in Accord With the Applicable Decisions of This Court Establishing Class Membership as a Prerequisite for Represen- tative Status	21
---	----

VI.

The Decision Below Presents an Important Constitutional Question Involving Basic Due Process Limits on State Procedure in Class Actions, Not Heretofore Decided by This Court	23
Conclusion	23

INDEX TO APPENDICES

Appendix A. Opinion	App. p. 1
Appendix B. Memorandum Decision	27
Appendix C. California Statutory Provisions	35
Appendix D. Respondent's Showing in Support of Class Certification	37
Exhibit "A". California Domestic Foreign Registrations, January-December, 1976 vs. January-December, 1975	41
Exhibit "B". California Domestic Foreign Registrations, January-March, 1977 vs. January-March, 1976	42
Appendix E. Petitioner Aktiebolaget Volvo's Subsidiaries and Affiliates	43

TABLE OF AUTHORITIES

Cases	Page
Adickes v. S. H. Kress and Co., 398 U.S. 144, 176 (1970)	13
Bailey v. Patterson, 369 U.S. 31 (1962)	21
Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 (1931)	11
Bolling v. Sharpe, 347 U.S. 497 (1954)	14
Brennan v. Midwestern United Life Insurance Co., 450 F.2d 999 (7th Cir. 1971)	19
Calagaz v. Calhoon, 309 F.2d 248 (5th Cir. 1962) ...	20
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)	11
Cotchett v. Avis Rent A Car System, Inc., 56 F.R.D. 549 (S.D.N.Y. 1972)	6, 18
Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980)	19
East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977)	3, 9, 21, 22
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) ..	20
Gen. Tel. Co. of Southwest v. Falcon, 50 U.S.L.W. 4638 (U.S. June 14, 1982)	17, 22
Gillette Co. v. Miner, 51 U.S.L.W. 5013 (December 6, 1982)	11
Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973)	19
Hall v. Beals, 396 U.S. 45 (1969)	21
Hansberry v. Lee, 311 U.S. 32 (1940)	3, 9, 12
Hanson v. Denckla, 357 U.S. 235 (1958)	20
Hotel Telephone Charges, In re, 500 F.2d 86 (9th Cir. 1974)	6, 18
Huff v. N.D. Cass Co. of Alabama, 468 F.2d 172 (5th Cir. 1972)	18

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)	11
Jenkins v. McKeithen, 395 U.S. 411 (1969)	13
Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727 (3rd Cir. 1970), cert. denied, 401 U.S. 974 (1972) .	15, 16
Kendall Motor Co. v. Volvo Western Distributing, Inc., No. C-72-358 W.H.O. (N.D. Cal. 1975)	18
Kremens v. Bartley, 431 U.S. 119 (1977)	21
La Mar v. H&B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973)	18
McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151 (1914)	15, 17
New York City Transit Authority v. Beazer, 440 U.S. 568 (1979)	14
Nissan Antitrust Litigation, In re, 577 F.2d 910 (5th Cir. 1978), cert. denied, 439 U.S. 1072 (1979)	5
Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962)	13, 14
Richardson v. Ramirez, 418 U.S. 24 (1974)	12
Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974)	21
Rosario v. Rockefeller, 410 U.S. 752 (1973)	21
Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974)	21
Sosna v. Iowa, 419 U.S. 393 (1975)	21
State of Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978)	17
Sugar Antitrust Litigation, In re, 588 F.2d 1270 (9th Cir. 1978)	11
United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980)	16, 20
Zahn v. International Paper Co., 414 U.S. 291 (1973)	11

Constitutional Provisions	Page
Seventh Amendment to the United States Constitution	13
Fourteenth Amendment to the United States Constitution	1, 2, 10, 11
Rules	
Federal Rules of Civil Procedure, Rule 23	19, 21
United States Supreme Court Rules, Rule 28.1	i
Statutes	
15 U.S.C. Sections 1231-1232	4
28 U.S.C. Section 1257	11
28 U.S.C. Section 1257(3)	2
California Business and Professions Code, Section 16700 et seq.	4
California Business and Professions Code, Section 16750	2, 16
California Civil Code, Section 1781	2
California Code of Civil Procedure, Section 382 ..	2, 4
Other Authorities	
Note, The California State Courts and Consumer Class Actions for Antitrust Violations, 33 Hastings L.J. 689 (1982)	11
Note, Collateral Attack on the Binding Effect of Class Action Judgments, 87 Harv. L. Rev. 589 (1974) ...	19
Note, The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23, 123 U. Pa. L. Rev. 1217 (1974)	20
Note, C. Wright and A. Miller, Federal Practice and Procedure, § 1754 (1972)	13

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA.

Petitioners Volvo of America Corporation and Aktiebolaget Volvo respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California entered in these proceedings on May 18, 1982.

Opinions Below.

The opinion of the Court of Appeal of the State of California is reported at 131 Cal. App. 3d 741, 182 Cal. Rptr. 800 and is set forth commencing at page A1 of the Appendix hereto. The unpublished memorandum decision of the Superior Court of the State of California for the County

of San Mateo is set forth at page B27 of the Appendix hereto.¹

Jurisdiction.

The judgment of the Court of Appeal of the State of California was entered on May 18, 1982. A petition for hearing in the California Supreme Court was timely filed on June 28, 1982 and was denied on August 25, 1982. Thereafter, on November 15, 1982, Mr. Justice Rehnquist signed an order extending the time for filing this petition for certiorari to and including January 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

“[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .”

The statutory provisions involved are Section 16750 of the California Business and Professions Code, Section 382 of the California Code of Civil Procedure and Section 1781 of the California Civil Code. These statutory provisions are set out at page C35 of the Appendix.

Statement of the Case.

Incredible as it may seem, the California Court of Appeal has certified an antitrust class of 50,000 people with a single representative plaintiff who is:

1. not typical of the class;
2. not representative of the class; and

¹Additional decisions in the case below include the Order Setting Aside Magistrate's Findings and Recommendation and Remanding Action to the state court, 421 F. Supp. 933 (N.D. Cal. 1976); the amended Statement on Application for Stay, (Rehnquist, J.), 429 U.S. 1331 (1976); and a denial of certiorari, 430 U.S. 915 (1977).

3. not injured by the alleged antitrust violation.

This decision by the California Court of Appeal violates the due process protections that this court has laid down for class actions in the cases of *Hansberry v. Lee*, 311 U.S. 45 (1940) and *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977).

This is an antitrust class action comprised of an alleged 50,000 members. Volvo is the only defendant. The Court of Appeal has certified the class despite finding that the only named plaintiff is not typical or representative of the class. The only question on this writ is whether it is unconstitutional to certify a class without a named plaintiff who is representative or typical of the class and who lacks standing to pursue her individual claim. The California Court of Appeal has certified respondent Charlene Rosack as the class representative despite a finding by the Trial Court, not overturned on appeal, that Rosack is not typical or representative of the purported class. If this invalid certification is allowed to stand, Volvo will be denied due process and forced to endure the agonies of an antitrust class action with 50,000 alleged class members (all Volvo purchasers in California between 1972 and 1976) and with an alleged exposure estimated by plaintiff to be between \$30 million and \$50 million.

The certification below is particularly suspect because respondent Rosack, a California plaintiff's attorney, is the only consumer to have ever complained of the alleged antitrust violation, because she is not representative of the putative class, and because she did not suffer any injury. Allowing the certification of Rosack under these circumstances is unprecedented and would deny Volvo its due process right to a full, fair and final adjudication.

Petitioners Aktiebolaget Volvo and Volvo of America Corporation (collectively referred to as "Volvo") are engaged in the manufacture and sale of Volvo automobiles, parts and accessories.

Respondent Charlene P. Rosack is a California resident who purchased a new 1972 model Volvo from an independent Volvo dealer. Respondent paid for her Volvo in cash, without any trade-in allowance. And, in a market where virtually all retail sales are the result of hard bargaining, respondent actually paid \$612 *more* than the manufacturer's suggested retail price. This so-called "Monroney" sticker price ("sticker price") is required by federal law to be affixed to the vehicle by the manufacturer (15 U.S.C. §§ 1231-1232), and it commonly serves as the starting point for customer bargaining. The actual sticker price varies with the model of car, optional equipment, and time of model year.

On March 12, 1976, respondent brought this action in the Superior Court of the State of California for the County of San Mateo on her own behalf and, under Section 382 of the California Code of Civil Procedure, on behalf of a class of all purchasers of Volvo automobiles in the State of California.

The Complaint alleges that Volvo engaged in retail price maintenance in violation of California's antitrust legislation (California Business and Professions Code § 16700 et seq.). Volvo allegedly forced and agreed with 64 independent dealers to grant little or no discount from the "Monroney" sticker price.

Thus, the class consists of those people who purchased *below* the Monroney sticker price. The sticker price or any

price above that is not alleged to be fixed and cannot be under federal law.²

Respondent moved in the trial court to certify a class of all persons who purchased a new Volvo automobile from a California Volvo dealer between 1972 and 1976 (approximately 50,000 persons). The only factual showing made in support of this motion consisted of the following:

1. An affidavit of plaintiff that she purchased a Volvo automobile during the time period in question;
2. An affidavit from her lawyer stating that he was familiar with class actions; and
3. An affidavit from another lawyer stating that he was familiar with a particular magazine which included automobile registration statistics.

No other evidence relating to the class issue was submitted by respondent.³

In opposition to respondent's motion, Volvo submitted undisputed evidence that:

(1) each sale of a Volvo was an individually negotiated transaction dependent upon factors such as trade-ins, market availability, the Monroney sticker price, the season of the year, the dealer's inventory, and many other factors (C.T. at 380, et seq.);

²Respondent does not allege that the federally-mandated sticker price is illegal or price fixed; indeed she cannot. See *In re Nissan Antitrust Litigation*, 577 F.2d 910, 916 (5th Cir. 1978), cert. denied, 439 U.S. 1072 (1979).

³In light of the California Court of Appeal's subsequent ruling, this showing will be deemed sufficient under California law to embroil a defendant manufacturer in costly and complex class action litigation. So that the Court may appreciate the true significance of the decision below, the respondent's entire showing is set forth in the Appendix hereto at page D37. Other citations to the record below refer to the Clerk's Transcript ("C.T.") prepared in connection with respondent's appeal of the Trial Court's order denying class certification.

(2) the Monroney sticker price may vary throughout the model year and is different depending upon the model of the car and the accessories with which it is equipped (C.T. at 760-762, ¶ 6);

(3) Volvos identical to that purchased by respondent were sold by the same and different dealers at widely varying prices at or near the time respondent purchased her car (C.T. 767, 770-772);

(4) respondent paid \$612 *more* than the sticker price for her Volvo (C.T. at 785-787); and

(5) affidavits of all California Volvo dealers stating they did not engage in price-fixing and that they sold the cars for any price they wished.

On May 22, 1978, the Trial Court filed a memorandum of decision denying class certification (Appendix, B27). In its opinion, the Trial Court made, *inter alia*, the following findings of fact:

1. Plaintiff failed to prove that she was representative of the putative 50,000 class members.⁴ Plaintiff's cash purchase at a price *above* the federally required Monroney sticker price was not "typical of any other purchaser." (Appendix, B33).

2. Plaintiff failed to establish that impact or "fact

⁴The Trial Court could have cited other important reasons for doubting respondent's representative status. Respondent Rosack is no ordinary consumer, she is an attorney who works for a plaintiff-oriented litigation firm. Her class action attorneys include one who was the named plaintiff in a case where certification was denied in part due to the court's concerns about attorney-generated class actions. See *Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y. 1972). The same attorneys were involved in *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974), where the court observed:

Whenever the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute.

500 F.2d at 91.

of injury" could be established on a class-wide basis. Specifically, the Trial Court found that: (a) The retail automobile market is notorious for haggling and negotiations in purchasing (Appendix, B32); (b) Plaintiff's attempts to explain a class-wide proof of injury based upon a series of attorney-generated graphs were "conjecture," and no evidence or experts showed that these arguments "went beyond speculation" (Appendix, B31); (c) In a market notorious for haggling and individually-negotiated purchases a general presumption of injury to each member of the class was inappropriate. (Appendix, B32).

3. Finally, the Trial Court found that this proposed class action was "utterly unmanageable." The complexities of proof of damages for some 50,000 possible purchasers, and the lack of any workable class-wide formula to consider individual variations (such as model, year, discount, trade-in allowance, financing and equipment) made difficulties of proof in this proposed class action "overwhelming" (Appendix, B33).

The Trial Court dismissed the class allegations in the Complaint and entered a final order dismissing the class action on June 21, 1978. An appeal followed.

The Court of Appeal did many amazing things on appeal, among them:

1. It affirmed the Trial Court's finding that the named plaintiff was atypical and unrepresentative of the class, but ordered class certification anyway; and

2. Without any new evidence it overturned the Trial Court's other factual findings.⁵

The Court of Appeal entered its original judgment granting a writ of mandamus on May 28, 1981. The writ directed the trial court to vacate its order denying class certification *without remanding the case for further factual findings on the class certification issues*, and to enter an order granting class certification.

The Court of Appeal's decision left standing the Trial Court's finding that respondent was not a member of the purported class of Volvo purchasers. In fact, the Court of Appeal explicitly "deferred" to the Trial Court's finding on that issue (Appendix, A24). At the same time, the Court of Appeal ordered that respondent be certified as the sole named class representative (Appendix, A25).

The Court of Appeal saw no contradiction in this result, because it also ruled that a class action could proceed even if some class members were not injured at all:

If base prices are raised, generalized injury results regardless of the purchaser's individualized negotiating

⁵The Court of Appeal held that:

1. While plaintiff was unrepresentative of the purported class claims, that fact was of no "import" because any Volvo purchaser could represent all others (Appendix A24);

2. In an antitrust case, once a price-fixing conspiracy is established, there is a potential presumption of class-wide injury, no matter what the nature of the alleged conspiracy, the nature of the market or the product, or the purchaser's individual negotiating abilities (Appendix, A20); and

3. It was "not clear" that the Trial Court denied certification due to lack of manageability. In any event, the case was manageable since "Speculative problems with regard to computation of damages" did not preclude class certification (Appendix, A24).

The Court of Appeal found the order denying class certification to be non-appealable and instead treated respondent's appeal as an application for a writ of mandate. Under California law, such a writ proceeding is a distinct suit, and the judgment finally disposing of that proceeding is a final judgment.

abilities. *The possibility that some members of the class may be injured to a lesser extent or even not at all will not . . . defeat class certification.*

(Appendix, A20, emphasis supplied).

By certifying a class without a representative or typical plaintiff, the Court of Appeal deprived Volvo of the following fundamental due process rights:

(1) The right to a representative plaintiff guaranteed under *Hansberry v. Lee*, *supra*, and *East Texas Motor Freight v. Rodriguez*, *supra*;

(2) Volvo has no way to assert its defense against the class claims through the named plaintiff because her claims are not those of the class;

(3) Volvo will be unable to fully adjudicate the claims of absent class members because respondent does not share the same interest and has not suffered the same injury as the class she purports to represent;

(4) Volvo will be unable to exercise its right of confrontation and cross-examination as to class claims because respondent is not a member of the class, and

(5) Volvo is denied its right to a final adjudication of the claims of absent class members because any judgment in the underlying class action will be subject to collateral attack on the ground that respondent was not representative of the class.

Volvo immediately challenged this unprecedented and unanticipated result in its petition for rehearing filed in the Court of Appeal on June 12, 1981:

[The Court of Appeal's] directions to the trial court to certify the class in the absence of a representative plaintiff is . . . unconstitutional under the California and United States Constitutions.

* * *

Certification of this class deprives Volvo of its right to Due Process and Equal Protection of the Laws.

(Volvo Petition for Rehearing at 2, 6).

The Court of Appeal granted Volvo's petition for rehearing, but one year later it reissued its opinion with only minor modifications (Appendix, A25).

Volvo next petitioned the California Supreme Court for a hearing and in its brief elaborated on the constitutional defects in the Court of Appeal's judgment:

A proper class action with a representative plaintiff will, after litigation, constitute a final judgment which is *res judicata* between the class and defendants. . . .

Here, however, if Charlene Rosack lost, another class member could attempt to bring another massive lawsuit, claiming that the Rosack judgment cannot be binding since she was admittedly not representative. Neither . . . the policy of *res judicata*, nor basic judicial fairness countenance such a result; the due process clause of the Fourteenth Amendment of the U.S. Constitution certainly does not.

(Volvo Petition for Hearing at 16).

The California Supreme Court, however, refused to grant a hearing, thereby rendering the Court of Appeal's judgment directing class certification final and not subject to any further review in the state courts.

REASONS FOR GRANTING THE WRIT.

I.

CLASS CERTIFICATION WHERE THE ONLY NAMED PLAINTIFF IS NOT A MEMBER OF THE CLASS DENIES DEFENDANTS THEIR DUE PROCESS RIGHT TO CONFRONT AND FULLY ADJUDICATE CLASS CLAIMS.

The California Court of Appeal ruled below that certification of a class action where the only named plaintiff is not a member of the class is constitutionally permissible. This judgment deprives Volvo of its due process rights, and is of great national importance because of its impact on other state class actions.⁶

This Court has never decided the question of whether state court certification of a class action where the only named plaintiff is not a member of the class violates the defendant's right to due process of law under the Fourteenth Amendment of the United States Constitution.⁷ It should do so now.

⁶State courts are commonly the only forums for class actions not involving federal questions because of the limitations on diversity-based class actions in the federal courts as set forth in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). State courts are increasingly the preferred forum for bringing other types of class actions as well. For example, the California legislature recently amended California's antitrust statute in light of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) to provide expressly a treble damages remedy to indirect purchasers, and the Ninth Circuit Court of Appeals has ruled that actions brought under this statute can be maintained only in state courts. *In re Sugar Antitrust Litigation*, 588 F.2d 1270 (9th Cir. 1978). See generally Note, *The California State Courts and Consumer Class Actions for Antitrust Violations*, 33 Hastings L.J. 689 (1982).

⁷Volvo clearly has the right to seek review of the decision below at this time. The judgment of the California Court of Appeal certifying respondent's class action conclusively determined an original proceeding for a writ of mandamus and is a "final judgment" within the meaning of 28 U.S.C. § 1257. *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14 (1931). The fact that this case arises on an original proceeding for a writ of mandate and that it has resulted in a separate final judgment distinguishes this case from those state and federal cases involving interlocutory appeals in class actions. See *Gillette Co. v. Miner*, 51 U.S.L.W. 5013 (U.S. December 6, 1982); *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

The leading case on the binding effect of class action judgments holds that state class action litigants possess due process rights. In *Hansberry v. Lee*, 311 U.S. 32, 42 (1940), this Court held that the judgment in a state class action is binding on absent class members only if the named class representatives possess the same interests and suffer the same injury as the absent class members. The Court based its holding solely upon the requirements of due process:

[A] selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.

Id. at 45.

The same requirements of due process must also protect a defendant in any state class action. Just as there is a denial of the absent class member's right to be heard if he or she is not adequately represented by plaintiff, there is also a denial of the defendant's right to be heard in *opposition* to the claims of absent class members where the named plaintiff is not a member of the class. The defendant cannot *fully and finally* adjudicate the alleged class claim where the "representative" plaintiff does not share the same interest and suffer the same injury as such absent members.⁸

⁸The existence of due process limits on procedural rules in state class actions was also recognized in *Richardson v. Ramirez*, 418 U.S. 24 (1974). In analyzing whether or not the California Supreme Court decision involved in *Richardson* was a non-reviewable advisory opinion because the claims of the named class representatives were moot, this Court stated that "California is at liberty to prescribe its own rules for class actions, *subject only to whether limits may be imposed by the United States Constitution*. . . ." 418 U.S. at 39 (Emphasis supplied). *Richardson* did not reach the question of whether California procedure had exceeded such limits because the record in that case established the existence of an unnamed party plaintiff with a live claim. In contrast, the court in this case found that the only plaintiff does not have, and never had, a claim against Volvo.

Defendant's due process right of confrontation and cross-examination⁹ as to class claims is denied where the named plaintiff is not a member of the class. A class action achieves economies of time, effort and expense by eliminating repetitious litigation and minimizing the possibility of inconsistent adjudications involving common questions by persons similarly situated.¹⁰ It is grounded on the notion that a representative member of the class asserts the class claims on behalf of all class members, and in so doing, eliminates multiple litigation and assures judicial economy.

At the same time, the defendant in a class action also avoids multiple litigation and is guaranteed its right to deny the class claims and to assert all applicable defenses against the class. The defendant does this by making its case against the class through the representative plaintiff. In this way, the defendant is guaranteed its right to confront the adverse party through the representative member of the class, and to cross-examine the class member on the alleged class claims by challenging the testimony of the representative plaintiff. The class action defendant is thus assured its minimum requirements of procedural due process in a civil action, including the right to confront and cross-examine the adverse party.

⁹*Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969) (due process right to cross-examine in action for declaratory and injunctive relief challenging the constitutionality of a state labor-management relations statute). In complex antitrust cases, witnesses must be present and subject to cross-examination to give credibility and weight to their testimony and to provide "even handed justice." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). Additionally, petitioners may also have a Seventh Amendment right to confront and cross-examine witnesses in civil proceedings. See, e.g., *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 176 (1970) (Black, J., concurring).

¹⁰C. Wright and A. Miller, *Federal Practice and Procedure* § 1754 (1972).

Where the named plaintiff is not a member of the class, defendants' rights to confront and cross-examine the adverse party are denied. The litigation goes forward without a representative of the class as a party to the proceeding. Thus, there is no way to confront the purported class claims by cross-examining the testimony of a class member at trial. This is a denial of due process and is not "even handed justice." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

The violation of Volvo's due process rights also constitutes a denial of Volvo's right to equal protection. The Court of Appeal's decision has created two classes of California defendants: class action defendants where the rights of cross-examination and confrontation are denied and all other defendants where such rights are preserved. Volvo's equal protection rights are violated because there is no conceivable reason for singling out class action defendants for different treatment. Volvo's due process rights and property rights are thus jeopardized by an "arbitrary assignment of burdens among classes that are similarly situated", and this is a type of discrimination forbidden by the Equal Protection Clause. See, *New York City Transit Authority v. Beazer*, 440 U.S. 568, 611 (1979) (White, J. dissenting), and *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("[D]iscrimination may be so unjustifiable as to be violative of due process").

II.

CERTIFICATION OF RESPONDENT AS A CLASS REPRESENTATIVE DENIES VOLVO'S DUE PROCESS RIGHT TO FULLY ADJUDICATE ITS CLAIMS AGAINST A BONA FIDE CLASS.

The Court of Appeal's judgment denies Volvo's right to fully adjudicate its claims against absent class members because the lack of any injury to respondent necessarily implies that she also lacks a sufficient interest in the outcome

of the underlying antitrust action to adequately represent the purported class. *McCabe v. Atchison, Topeka & Santa Fe Railway*, 235 U.S. 151 (1914); *Cf.*, *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

The Trial Court found that respondent Charlene Rosack, the sole named plaintiff, is not representative of the putative class of Volvo purchasers. The Court of Appeal "deferred" to the Trial Court's specific factual finding that plaintiff was not typical of other purchasers, but still ordered certification of the class (Appendix, A24).

According to respondent, Volvo effected a vertical retail price maintenance scheme whereby it coerced the 64 California Volvo dealers to give little or no discount from the "Monroney" sticker price (Appendix, A2). Presumably, the class of Volvo car purchasers was injured because they would have been able to negotiate discounts, or larger discounts, below the sticker price in a non-fixed market.

Based upon respondent's own theory, the person who walked into a Volvo dealer and did not negotiate for a discount below the sticker price could not have been injured. Respondent claims that the alleged price coercion only inhibited Volvo dealers from giving discounts below the sticker price. Such a theory has no impact on the person who purchased above the sticker price because he or she wanted that particular Volvo, no matter what the price.

Charlene Rosack's claim stands in sharp contrast to the class claims. The undisputed evidence is that Rosack purchased her Volvo for cash at a sum substantially above the sticker price (Appendix, A24). Rosack did not shop around for her Volvo, did not review advertising concerning Volvo prices, and did not negotiate in an effort to get a price lower than the sticker price (C.T. at 755-756). Thus, Rosack was

not injured by the alleged price fix because she bought above the sticker price and did not try to get a discount.

Rosack is not representative of a class of purchasers who were allegedly injured by a coercion not to discount prices below the sticker price. She paid a sum above the sticker price, and thus she bought her car at a price which was completely unaffected by the alleged price fix. The lack of injury means Rosack has no standing to sue, and a plaintiff without a claim cannot "represent" those who might have a claim. As the Third Circuit has noted:

Before one may successfully institute a class action "[i]t is of course necessary generally that [he] be able to show injury to himself in order to entitle him to seek judicial relief." *Kansas City, Mo. v. Williams*, 205 F.2d 47, 51 (8th Cir.), *cert. denied*, 346 U.S. 826 (1953). A plaintiff who is unable to secure standing for himself is certainly not in a position to "fairly insure the adequate representation" of those alleged to be similarly situated.

Kauffman, supra at 734.

Respondent concededly purchased a Volvo. But in the absence of any demonstrable injury from the alleged price maintenance scheme, that fact does not distinguish respondent from the person who shopped for a Volvo but could not afford one, the person who heard a friend complain that Volvos cost too much, or, indeed, any person with an abstract interest in how much Volvos cost.¹¹

¹¹California Business and Professions Code § 16750 requires that an antitrust plaintiff must be injured in his business or property by the alleged antitrust violation. The fact that respondent has lacked any substantive interest in the underlying antitrust action *from the outset* distinguishes this case from *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403-404 (1980). *Geraghty* held that a class representative whose claim became moot after the action was filed still possessed a sufficient interest in the separate issue of class certification to adequately represent the purported class on an appeal from the denial of class certification. This Court refused to reach the question of whether such a mooted representative could adequately represent the class on the merits. 445 U.S. at 407.

This Court has historically recognized that the class action procedure cannot be utilized to elevate such abstract interests into substantive rights. Due process requires that class representatives share at least some injury, and not merely some characteristic, with the members of the class.

The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant — not to others — which justifies judicial intervention.

McCabe v. Atchison, Topeka & Santa Fe Railway Co., *supra*, 235 U.S. at 162.

Rosack as an individual would be unable to state a claim for relief because she was not injured. The court below has in effect enlarged Rosack's substantive rights simply because she is purporting to represent a class claim. This conflicts with settled law: The fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove a claim for relief. *State of Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978).

III.

DUE PROCESS LIMITS MUST BE IMPOSED ON THIS STATE CLASS ACTION TO PREVENT INJUSTICE AND TO DISCOURAGE ATTORNEY-GENERATED CLASS ACTIONS.

The requirement that the class representative share some injury in common with the purported class members also helps to ensure that a class of persons who have suffered the same injury as the representative *actually exists*, so that the representative's claim and the class claims will share common questions of law or fact and the representative's claim will be typical of the class claims. *See, General Telephone Co. of Southwest v. Falcon*, 50 U.S.L.W. 4638 (U.S. June 14, 1982). In the absence of this requirement, legis-

lative provisions intended to provide for "private Attorneys General" are instead transformed into means by which plaintiff's counsel functions as a "part-time regulatory agency."¹²

This is precisely what will happen in the underlying antitrust action if the Court of Appeal's class certification order is upheld. This action is almost seven years old. Yet not once during all that time has a single Volvo purchaser, other than respondent, complained about the price of Volvos. Respondent is the only purchaser, out of an alleged class of 50,000 purchasers, to have contacted an attorney. Coincidentally, respondent's attorneys have already been implicated twice in class actions which were held to provide no real benefit to "class" members and which would never have been brought but for the "lucrative incentives" to the class attorneys. See *In re Hotel Telephone Charges*, *supra*, 500 F.2d at 92, and *Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y. 1972).

At the same time, the ability to manufacture class representatives on such flimsy grounds encourages multiple actions and indiscriminate forum shopping, thereby undermining the very goals which class actions are intended to achieve. Again, by coincidence, respondent's attorneys previously lost a price fixing case in federal court against Volvo on behalf of five terminated Volvo dealers. That action raised many of the same issues that respondent's attorneys now seek to litigate on behalf of a purported class of aggrieved purchasers. *Kendall Motor Co. v. Volvo Western Distributing, Inc.*, No. C-72-538 W.H.O. (N.D. Cal. 1975).

¹²See *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 466 (9th Cir. 1973); *Huff v. N.D. Cass Co. of Alabama*, 468 F.2d 172, 179 (5th Cir. 1972).

This Court has expressly recognized the potential for misuse of the class action mechanism under such circumstances and the important role which careful scrutiny of class certification issues plays in preventing such abuses. *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980). But, whereas Federal Rule of Civil Procedure 23 provides a clear procedure for avoiding such wrongs in federal class actions, the only limits on state court procedure must be derived from the due process rights of state class action litigants.

In this instance, to subject Volvo to costly and complex class litigation involving 50,000 *alleged* class members with *alleged* claims, according to plaintiff, of between \$30 million and \$50 million in damages on the basis of speculative allegations by a single, non-representative plaintiff, clearly exceeds the limits which due process imposes.

IV.

CERTIFICATION OF A NON-MEMBER CLASS REPRESENTATIVE DENIES VOLVO'S RIGHT TO A FINAL JUDGMENT BINDING ON ALL CLASS MEMBERS.

The Court of Appeal's certification of a non-member class representative also denies Volvo's due process right to a *final* adjudication of the underlying class action. Thus, absent Volvo purchasers may be able to mount collateral attacks on any judgment Volvo may receive against respondent in the underlying class action.¹³ Absent class members were not parties to the writ proceeding in the Court of Appeal, and they will not be bound by the finding that respondent could adequately represent their interest. Thus,

¹³See, e.g., *Gonzales v. Cassidy*, 474 F.2d 67, 74 (5th Cir. 1973), and *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1007 (7th Cir. 1971) (J. Stevens, dissenting). See generally Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589 (1974).

absent class members might collaterally attack any judgment on precisely the same grounds raised by Volvo in the writ proceeding below.

Given the absence of the threshold requirement of class membership, it makes no difference how vigorously respondent defends their interests, or how convincing the evidence is in Volvo's favor.¹⁴ Absent class members may argue that the California court never obtained jurisdiction over them so that they cannot be bound by any judgment entered. Such illusory class action judgments deny Volvo's due process rights.¹⁵

On the other hand, if respondent obtains a judgment against Volvo, then absent class members could reap the benefits of that judgment and Volvo may be estopped from attacking it. This result constitutes a return to the oft-rejected doctrine of "one-way intervention," and its countenance by this Court would frustrate the basic principles of fairness and judicial economy which are the only justification for class action procedures.¹⁶

¹⁴The due process requirements of adequate representation and notice must both be satisfied. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-177 (1974). See also Note, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. Pa. L. Rev. 1217 (1974).

¹⁵Volvo also has standing to challenge the California court's assertion of jurisdiction over absent class members, who can only be considered to be before the court in the person of the class representative. See *Hanson v. Denckla*, 357 U.S. 235, 244-245 (1958); *Calagaz v. Calhoon*, 309 F.2d 248, 254 (5th Cir. 1962).

¹⁶As this Court recently noted, two of the primary justifications that led to the development of class actions were the protection of the defendant from inconsistent obligations and the provision of a convenient and economical means for disposing of similar lawsuits. *United States Parole Comm'n v. Geraghty*, *supra*, 445 U.S. at 402-403. These justifications are totally frustrated by the denial of an adequate class representative.

V.

THE DECISION BELOW IS ALSO NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT ESTABLISHING CLASS MEMBERSHIP AS A PREREQUISITE FOR REPRESENTATIVE STATUS.

The holding of the California Court of Appeal that the class of all Volvo purchasers be certified with respondent named as its sole representative is also in direct conflict with numerous decisions by this Court which require that a class representative "must possess the same interest and suffer the same injury shared by all members of the class he represents." *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 216 (1974).¹⁷

In the leading case of *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977), this Court reversed the certification of a class action in an employment discrimination case on the basis of uncontradicted evidence that the named plaintiffs were not members of the class of discriminatees they purported to represent.

The appellate court in *East Texas Motor Freight* had certified the class *sua sponte* upon its findings that allegations of employment discrimination naturally give rise to common issues of fact and law, and that sufficient statistical evidence had been presented to establish a *prima facie* case of discrimination.¹⁸ This line of reasoning is exactly anal-

¹⁷See also, *Kremens v. Bartley*, 431 U.S. 119, 131 n.12 (1977); *Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *Rosario v. Rockefeller*, 410 U.S. 752, 759 n. 9 (1973); *Hall v. Beals*, 396 U.S. 45, 49 (1969); and *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962). These cases all arose out of federal court class actions and were decided on the basis of Article III's standing requirement and Federal Rule of Civil Procedure 23. As discussed in Part I, *supra*, the requirements of due process in state court class actions require that the net holding of these cases should be extended to state court class actions as well: a class cannot be represented by a plaintiff who is not a member of the class.

¹⁸*Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 49-52 (5th Cir. 1974).

ogous to the Court of Appeal's findings below that allegations of a price-fixing conspiracy alone give rise to common issues relating to liability and fact of injury, and that generalized evidence of damages can be presented on a class-wide basis (Appendix, A21).

This Court conclusively rejected such arguments, holding that the mere fact that common questions of law or fact are typically present "does not in itself ensure that the party who has brought the lawsuit will be an adequate representative." *East Texas Motor Freight, supra*, at 405. Instead, the courts must pay careful attention to the requirement that the named class representatives be typical members of the class, and *where the evidence conclusively establishes that such "representatives" suffered no injury in common with the class members, they simply are not eligible to represent that class. Id.* at 403-404.¹⁹

Respondent falls squarely within the ambit of this rule. The undisputed evidence establishes that she purchased her Volvo for cash at a price \$612 *above* the sticker price. Yet the alleged price conspiracy is claimed to have only inhibited Volvo dealers from giving discounts *below* the sticker price. Under these circumstances, respondent is not typical of the class she purports to represent. That was the conclusion of the Trial Court, and that conclusion was left undisturbed by the Court of Appeal.

The California Court of Appeal's certification of respondent as a class representative is therefore in direct conflict with *East Texas Motor Freight* and its precedents. The basic holding of these cases should also be applied to

¹⁹The holding in *East Texas Motor Freight* is underscored by the recent decision in *Gen. Tele. Co. of Southwest, supra*, rejecting the application of a "across-the-board" approach to class injury in the absence of a specific presentation of any common issues. 50 U.S.L.W. 4638 (U.S. June 14, 1982).

state class action procedure, as certification of a non-representative plaintiff denies class action litigants substantial constitutional rights without due process of law.

VI.

THE DECISION BELOW PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION INVOLVING BASIC DUE PROCESS LIMITS ON STATE PROCEDURE IN CLASS ACTIONS, NOT HERETOFORE DECIDED BY THIS COURT.

The issue presented is whether the defendants' due process rights are denied where a class is certified in a state proceeding in which the only named plaintiff is not a member of the class. This is an issue of overriding significance to the case at bar, and of great importance to all state class actions.²⁰ It is respectfully submitted that this Court should resolve this issue.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal.

Dated: December 29, 1982.

Respectfully submitted,

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²⁰See Note 6, *supra*.